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19 August 1980

MEMORANDUM FOR: APEX Steering Group Members

FROM:

  
Chairman, APEX Steering Group

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SUBJECT:

Questions and Answers for Use with the  
APEX Nondisclosure Agreement

Attached is a series of questions and answers for use by security officers in government and industry who will be briefing persons required to sign the APEX Nondisclosure Agreement. The first page may be read to the persons being briefed, but it is not recommended that the questions and answers be routinely disseminated. Instead, they should be retained by the briefing officer and used in responding to questions. These questions and answers will be provided to the briefing officers through the APEX Working Group #1 membership. Any additional queries may be directed to the APEX Control Staff.


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Attachment  
As stated

State has sent NDA to 

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Nsc contacted by  They indicated that NDA has not yet gone forward. DCI will talk to Christopher and advise that without ~~any~~ further changes he will proceed with NDA.

19 August 1980

APEX Nondisclosure Agreement

Questions and Answers

Introduction: The President has determined that the U.S. Government will establish a new system to handle Sensitive Compartmented Information (SCI). The new system is called the APEX Special Access Control System.

Before you can gain access to information controlled under the APEX system, you will be required to sign an APEX Nondisclosure Agreement. Every effort has been made to write the Nondisclosure Agreement simply and clearly so that you the reader can readily understand all of the provisions of the Agreement.

In simplest terms the Agreement provides that in return for granting you access to Sensitive Compartmented Information, the Government asks you to agree never to disclose this information to an unauthorized party. The Agreement provides a way for you to be certain whether or not information you wish to disclose or publish is controlled under the APEX System and also specifies certain sanctions or penalties which may be imposed if you violate this Agreement.

We want to make sure that you have read the Agreement carefully and understand it. Therefore, we are prepared to answer any questions you may have about the meaning of any provision of this Agreement. Many of your questions have been addressed before and we have obtained authoritative answers from the APEX Control Staff and its legal advisor. If we are uncertain about the answers to any question, we will consult with the Control Staff and get the answer for you.

QUESTIONS

A. General:

WHY THIS FORM

QUESTION: I have (or had) access to Sensitive Compartmented Information and signed a different form. Why do I now need to sign this Agreement?

ANSWER: In the interest of uniformity, every person who will be given access to SCI will have to sign the same Agreement - the APEX Nondisclosure Agreement. The major differences between this and previous Agreements is that this one provides a procedure whereby you can determine in advance whether material you intend to publish contains SCI. This helps to avoid the risk of Government legal action against you as a consequence of your publication or disclosure of information. In addition, this Agreement makes explicit your obligations and gives you a better understanding of the actions which may be taken against you if you fail to live up to these obligations.

DO I NEED AN ATTORNEY

QUESTION: Do I need to show this Agreement to an attorney before I sign it?

ANSWER: It is entirely up to you whether you show the Agreement to a lawyer. We believe the Agreement is simple and straight forward. If we agree to provide you access to SCI information, you agree never to disclose the information to an unauthorized party. However, if we have failed to answer any questions to your satisfaction or if you simply prefer to show the Agreement to your lawyer and have him clarify any points you may do so.

Let us know before you see an attorney because in certain cases it will be necessary for us to obtain a clearance for your attorney. We also will be pleased to provide your attorney with the name of a Government attorney with whom he may speak if he has any questions.

QUESTION: Will the Government pay for the cost of an attorney?

ANSWER: No. In this and similar situations you must pay for your own lawyer. For example, if you go to a bank or finance company for a loan, you must agree to repay the money and also consent to certain actions should you fail to abide by the terms of the loan agreement. You can sign the required forms without going to a lawyer or you can ask your lawyer for advice, but the bank or finance company is not going to pay for your lawyer. A similar situation applies with respect to the APEX Nondisclosure Agreement.

#### FAILURE TO SIGN

QUESTION: What will the Government do if I refuse to sign the APEX Nondisclosure Agreement?

ANSWER: The Government will not provide you with access to Sensitive Compartmented Information or, if you now have such access, will terminate that access. If your current access is terminated, you will still have to abide by the terms of any agreement which you previously signed.

#### RETENTION OF AGREEMENT

QUESTION: Can I keep a signed copy of the Nondisclosure Agreement?

ANSWER: The Agreement itself is not classified. However, the fact that a particular person signed it at a particular time may be classified. In such a case, you would not be able to keep a signed copy.

If, for example, you were a Government employee and your ostensible duties would not require access to APEX information, the fact that you had signed an APEX Agreement would be classified. If you were a contractor employee and the corporation was working on a project which could not be acknowledged as requiring access to APEX information, the fact that you, a corporate employee, had signed the Agreement would be classified.

NUMBER OF AGREEMENTS TO BE SIGNED

QUESTION: Will I have to sign a new APEX Nondisclosure Agreement every time I change employment?

ANSWER: Ordinarily no. It is intended that you will sign only one APEX Nondisclosure Agreement. Your obligations under this Agreement will apply to any information you receive access to under the APEX System regardless of whether you are in Government or the private sector, regardless of which company or Government agency you work for and regardless of which Government agency may provide you with access to SCI. Of course, there may be circumstances which will require that you sign another APEX Nondisclosure Agreement. For example, if you change employers and need to begin work on a particular project immediately, you may be asked to sign a new Nondisclosure Agreement if confirmation that you had previously signed an Agreement would be delayed.

B. Questions About Individual Paragraphs in the APEX Nondisclosure Agreement

PARAGRAPH ONE

QUESTION: This paragraph mentions the Director of Central Intelligence. Does this mean that if I sign this Agreement I will have access to CIA information?

ANSWER: Not necessarily. Appropriate information from the Department of State, Department of Energy, Department of Treasury, Department of Justice and Department of Defense as well as from CIA can be protected under the APEX Control System. The DCI is involved because he is responsible for creating or continuing certain special access programs (Section 4-201 of Executive Order 12065) and for ensuring the establishment of common security and access standards for managing and handling certain systems, information and products (Section 1-601(i) of Executive Order 12036).

QUESTION: This paragraph mentions information which is classified or classifiable. What does classifiable mean?

ANSWER: This refers to information which meets the criteria for classification under Executive Order 12065, but which has not yet been properly marked. For example, if I give you a briefing on a project which involves classified information, your notes, before they are reviewed and appropriately stamped to indicate their classification, are "classifiable."

PARAGRAPH TWO

QUESTION: This paragraph indicates that I have received a security indoctrination. What happens if after receiving this indoctrination, I decide not to sign the Nondisclosure Agreement.

ANSWER: The indoctrination does not include classified information and you will be given access to SCI only after you sign the Agreement.

QUESTION: This paragraph indicates that I "may" be required to sign an acknowledgement when being granted access to each category of Sensitive Compartmented Information. Does this mean I have the choice of signing or refusing to sign such acknowledgements.

ANSWER: No, you do not have this choice. If a particular Government Agency requires that an acknowledgement be signed and you refuse to sign, you will be denied access to the particular category of SCI in question. Government agencies, however, in administering APEX compartments may either require that you sign an acknowledgment or allow a security officer to record the fact that he briefed you on a particular category of SCI. It is expected that each Agency will develop procedures with respect to acknowledgements.

PARAGRAPH THREE

QUESTION: What is meant by "indirect unauthorized disclosure"?

ANSWER: One example of indirect unauthorized disclosure would be if instead of relating classified details about an APEX project you told an unauthorized individual where he might obtain the information, for example, that he should read the story on pages 30-33 of a particular magazine because it was entirely accurate.

QUESTION: The Nondisclosure Agreement mentions the need for prior written authorization. Won't there be cases in which oral approval would be sufficient?

ANSWER: In order to avoid any possible misunderstanding at the time of publication or disclosure and the possibility of disputes at some later date, we must insist on written authorization.

PARAGRAPH FOUR

QUESTION: Why do I have to submit material for security review to the Department or Agency which last authorized my SCI access? For example, if my last SCI access was from the Navy but I am writing a book about an Army project, wouldn't it make more sense for me to submit the book to the Army rather than to the Navy? Alternatively, if I have been out of the SCI area for some years and can't remember which Department or Agency gave me my last access but I do remember working on an SCI project for the Air Force, will I get in trouble if I send my book to the Air Force?

ANSWER: The requirement that you submit materials for review to the Department or Agency which last issued you an SCI access was designed to make things as easy for you as possible. If you were working with SCI at the time of submission, we felt it would be easiest for you to submit the book to the Department or Agency which was sponsoring your SCI access. If you were retired or not working with SCI, we felt you would be more likely to remember the last SCI access you had than the first one.

You need not worry about submitting a book on an Army subject to the Navy because, as indicated in paragraph five of the Agreement, it is the responsibility of the Department or Agency receiving your submission to coordinate with other concerned Departments or Agencies. Indeed, this requirement works in your favor because you are not required to guess which Department or Agency should review the submitted material and, if your book covers a number of subjects, you do not have to be concerned about submitting copies to more than one agency.

It also should be clear that so long as material is received by any Department or Agency under the APEX Control System, the review process can be accomplished and we will not object or penalize you if you send your material to any Department or Agency from whom you received SCI access.

QUESTION: I still am not sure what materials I need to submit for review.

ANSWER: Any proposed disclosure or publication whether written or oral which may relate to, be based upon, or contain SCI should be submitted for review. For your own protection we recommend that you submit for review all material relating to intelligence or intelligence activities. In that way we can inform you whether Sensitive Compartmented Information could be jeopardized and assist you to avoid causing inadvertent harm to the national security. You will also avoid any risk that Government legal action would have to be taken against you.

QUESTION: As a contractor employee I regularly draft proposals. Can SCI be used in such proposals and disseminated without the need to obtain prior written authorization?

ANSWER: Only if the recipients of the proposal are cleared for that category of SCI.



QUESTION: Certain information which I know to be SCI has appeared in a newspaper article. Can I consider this information declassified and freely quote the article and disseminate the SCI information without obtaining prior written authorization?

ANSWER: An unauthorized disclosure of classified information does not result in declassification of the information. Of course, in the abstract, merely quoting a newspaper article is not a problem. However, if you quote the article in a context which confirms its accuracy you will have breached this Nondisclosure Agreement.

PARAGRAPH FIVE

QUESTION: What can I expect to happen in the course of the security review of the materials I have submitted?

ANSWER: The Department or Agency which receives the submitted material will make certain that all of the other Departments and Agencies which have given you SCI access have an opportunity to review the material. If the information you wish to disclose does not involve SCI or classified information, you will be so advised in writing by the Department or Agency which received the material. If the reverse is true, either the Department or Agency to which you sent the material or the Department or Agency whose material is most heavily involved will inform you of this fact and, following this notification, discuss with you recommended deletions or revisions which would avoid exposure of SCI.

We would hope that in a majority of cases a way could be found to accommodate your publication requirements, maintain the sense of what you wish to convey and at the same time avoid possible damage to the national security. Considerable experience with prepublication review supports such optimism.

QUESTION: Will the review process be used to prevent me from writing articles which may be critical of, or embarrassing to, the Government?

ANSWER: No. You are free to criticize or embarrass the Government as much as you desire. The only information that the Government can oblige you to delete is information which is classified.

QUESTION: Can the review process be used as a device to prevent me from bringing illegal, improper or wasteful activities to the attention of the proper authorities?

ANSWER: No. Whether or not classified information is involved you are free to bring evidence of such activities to the attention of the head of the Department or Agency, or to the Inspector General or General Counsel; to the Attorney General of the United States; to the Intelligence Oversight Board or to the House or Senate Intelligence Committees.

QUESTION: Am I free to publish if I do not receive a response within thirty working days?

ANSWER: No, you should not consider yourself free to publish until you have received the written authorization mentioned in paragraph four of this Agreement. However, should the Government fail to respond within thirty working days you should notify the head of the Agency to which you submitted the material or the DCI. Every effort will be made to expedite your case.

QUESTION: What recourse do I have if I disagree with the Government's position on classification?

ANSWER: You can appeal to the Senior Intelligence Officer and, if still dissatisfied, you can sue for a judicial determination on the issue of classification.

QUESTION: Can the Government keep me from publishing or disclosing information?

ANSWER: In an appropriate case the Government can go into court and seek a Temporary Restraining Order. This Order, backed by the power of the court, would forbid you from publishing or disclosing the information until the court could hold a hearing on the matter and determine what relief is appropriate. The court could rule in your favor and sanction publication or it could issue a permanent injunction forbidding publication.

PARAGRAPH SIX

QUESTION: This paragraph indicates that a breach of this Agreement may result in the termination of my employment. If I am in military service and breach this Agreement will I receive an automatic discharge?

ANSWER: Breach of the Nondisclosure Agreement does not result in an automatic discharge from military service. The specific administrative sanctions which your Service will take against you will be determined by that Service.

QUESTION: I am a contractor employee. Can I be fired for breaching my Nondisclosure Agreement?

ANSWER: The U.S. Government cannot fire a person who is not a U.S. Government employee nor can it order your employer to fire you. Indeed, the Government will not make any employment or discharge recommendations to the company. It can, however, revoke your access to SCI and your security clearances. It also can forbid the company from using your services on SCI and classified projects.

QUESTION: What is the meaning of the sentence "Nothing in this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation?"

ANSWER: It means you may be prosecuted for any law which you may have violated, not just the laws specifically mentioned in this Agreement.

PARAGRAPH SEVEN

QUESTION: This paragraph informs me that the Government may "seek any remedy available to it" to enforce the Agreement. What does this mean?

ANSWER: The Government may seek a court injunction to prevent an unauthorized disclosure of SCI. It also may take a variety of administrative or legal steps either to prevent the violation of this Agreement or to punish you if you have breached the Agreement. These steps may include:

- a. imposition of penalties prescribed for security violations;
- b. revocation of SCI access and security clearances;
- c. imposition of appropriate administrative sanctions up to and including termination of Government employment;
- d. assessment of any financial penalties which may be provided by contract between the Government and the contractor;
- e. seeking injunctive relief from a court which would forbid disclosure of SCI information;
- f. institution of a civil suit for recovery of damages suffered by the Government as a result of your breach of this Agreement and recovery of any financial gain you may have realized as a result of the breach; and
- g. initiation of criminal prosecution against you.

QUESTION: Why should I pay the Government's court costs if the Government doesn't want me to publish certain information.

ANSWER: The Government at its own expense will review any material you desire to disseminate or publish in order to determine whether it contains information which requires protection under the APEX Control System. The Government also is willing to work with you in an attempt to find an alternative wording which will convey the substance of what you wish to communicate but without exposing such information. If, however, the Government must go to court to enforce this Agreement, it will ask the court to require that you pay court costs and attorney fees which it incurs as a result.

PARAGRAPH EIGHT

QUESTION: Will the Nondisclosure Agreement prevent me from seeking a patent for a device which is based on SCI?

ANSWER: If you would be entitled to a patent but your invention is based upon SCI you are required to submit the invention for a classification determination to the Department or Agency which granted the SCI access. If the invention is classified, appropriate procedures would have to be followed. Ultimate declassification of the invention would have to include a determination that Sensitive Compartmented Information would not be jeopardized thereby. Upon declassification, however, your patent rights would not be affected by this Nondisclosure Agreement.

PARAGRAPH NINE

QUESTION: This paragraph uses the term "authorized representative" of the Department or Agency. Who is an "authorized representative?"

ANSWER: By authorized representative it is meant the SIO or his designee. Ordinarily responses to questions relating to this Agreement will come from the APEX Control Officer or a member of the Office of General Counsel of the Department or Agency to which you submitted your material. Such persons should be considered authorized representatives.

QUESTION: Does this paragraph mean that my obligations under the Agreement apply even if I do not currently have SCI access and even if I am no longer employed by the Government or working on any Government contracts?

ANSWER: Yes. You are obligated to protect Sensitive Compartmented Information from unauthorized disclosure in perpetuity from the time you receive access to this information. Clearly the injury to the United States which may result from unauthorized disclosure of SCI does not depend on your employment status but rather on the exposure of information which may enable foreign nations to take steps to deny us information or neutralize our intelligence efforts. In order to prevent such injury, you are required to submit for review any material you wish to publish or disclose which contains or which may be based upon SCI, even though you may no longer have SCI access.

PARAGRAPH TEN

QUESTION: This paragraph notes that if a court should find any provision of this Agreement to be unenforceable, all other provisions remain in full force and effect. Which provisions are of doubtful legality and thus unenforceable?

ANSWER: We do not believe, and do not mean to imply, that there are any provisions of doubtful legality. Nor do we expect a court to find any portion of the Nondisclosure Agreement to be unenforceable. This Agreement is designed to be used for many years and, realizing that certain legal changes will occur from decade to decade, we have included standard language used in drafting legislation as well as contractual agreements as a precaution in case of unforeseen changes in the law.

QUESTION: This paragraph indicates that the Nondisclosure Agreement only relates to SCI. Paragraph 3, however, states that "I further understand that I am obligated by law and regulation not to disclose any classified information. How do these paragraphs relate to each other?

ANSWER: The statement in paragraph 3 was included to remind you of your obligation to protect other classified information and to prevent the erroneous conclusion that by signing the APEX Nondisclosure Agreement and obtaining SCI access you are relieved of a duty to protect such classified information.

PARAGRAPH TWELVE

QUESTION: Does this paragraph mean that if I sign the Nondisclosure Agreement and then write a book, I will not be entitled to retain any royalties I may earn.

ANSWER: The assignment clause refers to royalties which result from disclosures, publications or revelations not consistent with the terms of this Agreement. If, for example, the subject matter of your book is such that you should have had reason to believe that it was based on SCI and you did not give the Government an opportunity to review the book, then the assignment clause would apply. If you submitted the book for review and were informed that it did not contain SCI or if you deleted any SCI so identified, no royalties would be at risk. Similarly, if the subject matter of the book was such that you would have no reason to believe that it contained SCI information, (for example, a book on early American furniture) there would be no reason to submit it for review and no reason to expect that your royalties would be in jeopardy.

NONDISCLOSURE AGREEMENT  
SENSITIVE COMPARTMENTED INFORMATION

1. I, (print full name) \_\_\_\_\_, hereby acknowledge that I have received a security indoctrination concerning the nature and protection of certain classified information and intelligence sources and methods, which are known as Sensitive Compartmented Information, designated as: \_\_\_\_\_

\_\_\_\_\_ and hereinafter referred to as "the designated Sensitive Compartmented Information."

2. I have been advised that direct or indirect unauthorized disclosure, unauthorized retention or negligent handling of the designated Sensitive Compartmented Information by me could cause irreparable injury to the United States and be used to advantage by a foreign nation.

3. I have been advised of the security handling, storage, and transmittal procedures which are to be used to protect the designated Sensitive Compartmented Information, and the procedures to be followed in ascertaining whether other persons to whom I contemplate disclosing this information have been approved for access to it, and I understand these procedures.

4. In consideration of being granted access to the designated Sensitive Compartmented Information, I pledge that I will never divulge such information, in any form or any manner, to anyone who is not authorized to receive it, without prior written authorization from an appropriate official of the United States Government.

5. I have been advised that any unauthorized disclosure of the designated Sensitive Compartmented Information by me may be a substantial violation of this agreement, and may result in the termination of my access. In addition, I have been advised that any such unauthorized disclosure by me may constitute violations of United States civil or criminal laws, including, as to the latter, the provisions of Sections 793, 794, and 798, Title 18, United States Code, and of Section 783, Title 50, United States Code.

6. I understand and agree that the United States Government may choose to apply, prior to any unauthorized disclosure of the designated Sensitive Compartmented Information by me, for a court order prohibiting such disclosure.

7. In any civil action which may be brought by the United States Government for breach of this agreement, the law of the District of Columbia shall govern the interpretation of this agreement. I have been advised that the action can be brought against me in any of the several appropriate United States District Courts where the United States Government may elect to file the action. Court costs, and reasonable attorneys fees incurred by the United States Government may be assessed against me if I lose such action.

8. I hereby assign to the United States Government all rights, title and interest, and all royalties, remunerations, and emoluments that have resulted, will result or may result from any such disclosure, publication or revelation not consistent with the terms of this agreement.

9. I understand that, upon demand by an authorized representative of the United States Government, I must surrender all materials concerning the designated Sensitive Compartmented Information which are then in my possession or for which I am then responsible. I understand that the designated Sensitive Compartmented Information is, and will continue to be, the property of the United States Government, and my failure to return all materials reflecting this information to the United States Government upon demand, may subject me to the penalties set out in Section 793 of Title 18, United States Code.

10. Unless I am released in writing by an authorized representative of the United States Government, I understand that all the conditions and obligations imposed upon me by this agreement apply during the time I am granted access to the designated Sensitive Compartmented Information, and at all times thereafter.

11. Nothing in this agreement constitutes a waiver on the part of the United States of the right to prosecute me for any statutory violation. Nothing in this agreement constitutes a waiver on my part of any defenses I may otherwise have in any civil or criminal proceedings.

12. Each provision of this agreement is severable. If a court should find any provision of this agreement to be unenforceable, all other provisions of this agreement shall remain in full force and effect.

13. I have read this agreement carefully and my questions, if any, have been answered to my satisfaction. I acknowledge that the briefing officer has made available Sections 793, 794, 798, and 1001 of Title 18, United States Code, Section 783 of Title 50, United States Code, Executive Order 12065, as amended, and the Information Security Oversight Office Directive No. 1 of 2 October 1978, as amended, which implements this Executive Order, so that I may read them at this time, if I so choose.

14. I have been advised that any false statement made by me in this agreement may subject me to the penalties set out in Section 1001 of Title 18, United States Code.

15. I make this agreement without any mental reservation or purpose of evasion.

\_\_\_\_\_  
(Signature of Witness)

\_\_\_\_\_  
(Signature of individual briefed)

\_\_\_\_\_  
(Briefing Date)

\_\_\_\_\_  
(Organization)

\_\_\_\_\_  
(SSN-See Notice below)

NOTICE

The Privacy Act, 5 U.S.C. 552a, requires that federal agencies inform individuals, at the time information is solicited from them, whether the disclosure is mandatory or voluntary, by what authority such information is solicited, and what uses will be made of the information. You are hereby advised that authority for soliciting your Social Security Account Number (SSN) is Executive Order 9397. Your SSN will be used to identify you precisely when it is necessary to certify that you have access to the information indicated above. While your disclosure of SSN is not mandatory, your failure to do so may delay the processing of such certification.